IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE QUANDEL GROUP	:	**CIVIL ACTION**
	:	
v.	:	
	:	
CHAMBERLIN CO., Inc. and	:	
SOUTHERN COMMERCIAL	:	
WATERPROOFING	:	**NO. 98-5762**

M E M O R A N D U M

WALDMAN, J. **June 11, 1999**

This is a breach of contract action. Presently before the court is defendant Chamberlin Company's Motion to Dismiss for lack of personal jurisdiction and improper venue.

Plaintiff alleges that it entered into a subcontract with defendant Chamberlin whereby it was to provide waterproofing for a project at Virginia Polytechnic and State University in Blacksburg, Virginia for which plaintiff was the general contractor. Plaintiff alleges that at some point Chamberlin began to perform its contractual duties "either through or in conjunction with" defendant Southern Commercial Waterproofing, its "parent or subsidiary corporation," and breached the contract by improperly and untimely performing the waterproofing work.

Once a defendant asserts lack of personal jurisdiction, the burden is upon the plaintiff to make at least a prima facie showing with sworn affidavits or other competent evidence that such jurisdiction exists. See Time Share Vacation Club v. Atlantic Resorts, Ltd., 735 F.2d 61, 66-67 n.9 (3d Cir. 1984); Leonard A. Fineberg, Inc. v. Central Asia Capital Corp., 936 F. Supp. 250, 253-54 (E.D. Pa. 1996); Modern Mailers, Inc. v. Johnson & Quin, Inc., 844 F. Supp. 1048, 1051 (E.D. Pa. 1994). To make such a showing, a plaintiff must demonstrate "with reasonable particularity" contacts between the defendant and the forum sufficient to support an exercise of personal jurisdiction. Mellon Bank (East) PSFS Nat'l Ass'n v. Farino, 960 F.2d 1217, 1223 (3d Cir. 1992).

A federal district court has personal jurisdiction over a defendant to the same extent as a court of the state in which the district is located. See Fed. R. Civ. P. 4(k). The Pennsylvania long-arm statute is co-extensive with the due process clause of the Fourteenth Amendment. See 42 Pa. C.S.A. § 5322(b); Pennzoil Products Co. v. Colelli & Assoc., 149 F.3d 197, 200 (3d Cir. 1998); Nagele v. Holy Redeemer Visiting Nurse Agency, 813 F. Supp. 1143, 1145 (E.D. Pa. 1993). Consistent with due process, personal jurisdiction may be general or specific depending on the nature of a defendant's contacts with the forum state.

To establish general jurisdiction, a party's contacts with the forum must be "continuous and substantial." Contacts are continuous and systematic if they are "extensive and pervasive." Fields v. Ramada Inn, 816 F. Supp. 1033, 1036 (E.D. Pa. 1993). Pennzoil, 149 F.3d at 200. There has been no showing or suggestion that Chamberlin has continuous and substantial contacts with Pennsylvania. Chamberlin is incorporated under the law of North Carolina and maintains its principal place of business is in Charlotte. Its averments that it is not licensed to do business in Pennsylvania; has no office, facility, property, employees or sales agents in Pennsylvania; has never conducted business in Pennsylvania; has not advertised in Pennsylvania; and, has no telephone or bank account in Pennsylvania are uncontroverted.

Specific jurisdiction exists when a defendant undertook an affirmative act by which he purposefully availed himself of the privilege of conducting activity in the forum and the plaintiff's claim is related to or arises out of the defendant's contacts with the forum. See Burger King v. Rudzewicz, 471 U.S. 462, 476 (1985); Pennzoil, 149 F.3d at 201. The defendant must have sufficient "minimum contacts" with the forum to have reasonably anticipated being required to defend against the claim in a court there. Id. A determination of whether sufficient minimum contacts exist essentially involves an examination of the

relationship among the defendant, the forum and the litigation. Shaffer v. Heitner, 433 U.S. 186, 204 (1977). Id. If minimum contacts have been established, a court may inquire as to whether "the assertion of personal jurisdiction would comport with fair play and substantial justice." Pennzoil, 149 F.3d at 201; Grand Entertainment v. Star Media Sales, Inc., 988 F.2d 465, 481 (3d Cir. 1993). Id.

In assessing minimum contacts in a contract case, a court considers prior negotiations, contemplated future consequences, the course of dealing of the parties and pertinent contract terms. See Burger King, 471 U.S. at 479; Mellon Bank (East) PSFS, National Ass'n v. Farino, 960 F.2d 1217 (3d Cir. 1992). Merely entering into a contract with a forum resident does not subject a nonresident to personal jurisdiction. See Nolt & Nolt, Inc. v. Rio Grand, Inc., 738 F. Supp. 163, 166 (E.D. Pa. 1990); Hall-Woolford Tank Co. v. R.F. Kilns, 698 A.2d 80, 83 (Pa. Super. 1997).

Plaintiff has not argued that Chamberlin has sufficient contacts with the forum to sustain an exercise of personal jurisdiction. Rather, plaintiff contends that a forum selection clause in the contract constitutes consent to jurisdiction. The clause provides in relevant part:

> If at any time during the course of construction or within two years after completion of construction, a dispute should arise . . . and the total amount of such dispute does not exceed $100,000, including

> counterclaims and set-offs . . ., the Contractor and Subcontractor agree that the Court of Common Pleas of Schuylkill County shall have exclusive jurisdiction and venue to resolve any such claims.

This clause literally does not apply to the instant dispute. Defendant consented to litigate in Pennsylvania only disputes involving $100,000 or less. It is undisputed that the amount in controversy exceeds $100,000. Plaintiff maintains, however, that the clause contains a typographical error and should read "the total amount of such dispute does exceed $100,000." To support this proposition plaintiff points to the preceding paragraph which provides that any dispute not in excess of $100,000 shall be resolved by final and binding arbitration. Plaintiff suggests that it would be inconsistent for both paragraphs to address claims "not in excess of $100,000.

The clear language of the clause at issue, however, plainly limits its applicability to claims not exceeding $100,000. Plaintiff has never sought or obtained a reformation of the contract to reflect the purported intent of the parties, and such requires proof by clear and convincing evidence that as the result of a mistake the writing does not reflect the actual intent of the parties. See International Union of Electronic, Elec., Salaried, Machine and Furniture Workers v. Murata Erie North America, Inc., 980 F.2d 889, 907 (3d Cir 1992). See also Overhold v. Reliance Ins. Co. of Philadelphia, 179 A. 554, 557

(Pa. 1935) (when equity requires an "instrument should be reformed to conform to the intentions of those bound by it").[1]

The arbitration provision and forum selection clause are not necessarily irreconcilable. As defendant suggests, disputes can and do arise about the enforceability of particular arbitral awards which must be resolved by a court. Parties may also designate a court for purposes of entry of a judgment upon an arbitral decision and for resolution of any subsequent dispute regarding satisfaction or execution upon a judgment.

The contract contains a clause providing that it is to be "interpreted in accordance with the law of the Commonwealth of Pennsylvania." A choice of law clause is a factor to be considered but is not sufficient to establish personal jurisdiction. See Burger King, 471 U.S. at 482.

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[1] There has been no showing that Chamberlin intended to consent to be sued in Pennsylvania on claims exceeding $100,000 and it has submitted an affidavit denying such. While it may be unusual to condition consent on the amount at stake, a party waiving a fundamental right to object to the absence of personal jurisdiction cannot be held to more than it agreed to. See Burger King, 471 U.S. at 482 n.24 (forum selection provision for specified disputes inapplicable to other disputes). Relief may be afforded to a party who is unilaterally mistaken about a material contract term only upon a showing that the other party engaged in fraud or had good reason to know the aggrieved party was mistaken. See Lexington Line Lumber and Millwork Co., Inc. v. Pennsylvania Publishing Corp., 301 A.2d 684, 687 (Pa. 1973); Alderfer v. Pendergraft, 301 A.2d 684, 687 (Pa. Super. 1982). It is uncontroverted that plaintiff drafted the contract at issue. There has been no showing that Chamberlin had good reason to know plaintiff was unilaterally mistaken about a term it had drafted or that Chamberlin understood the term to mean other than what it said.

The contract also states that "the parties irrevocably agree that this Contract was negotiated and executed in the Commonwealth of Pennsylvania." Chamberlin avers, without contradiction, that in fact its representatives never traveled to Pennsylvania, it executed the contract in North Carolina and performed under the contract in Virginia. Contractual language that a contract shall be deemed to have been "made" or "entered into" in the forum state is not sufficient to establish personal jurisdiction. Id. (language providing for choice of law and that contract "shall be deemed made and entered into" in the forum state); Tandy Computer Leasing v. Demarco, 564 A.2d 1299, 1303 (Pa. Super. 1989) (language that contract shall be governed by law of forum state and "shall be deemed made" in forum state).

Plaintiff has not presented evidence of additional contacts sufficient to establish personal jurisdiction. See Burger King, 471 U.S. at 482 (20-year interdependent relationship requiring ongoing forum contacts including sending of payments into forum sufficient); Mellon Bank, 960 F.2d at 1223 (contract creating ongoing relationship between defendant guarantors and bank requiring loan repayments in forum state sufficient although "a close case").

That Chamberlin communicated with plaintiff by telephone, telefax and mail is not sufficient to establish personal jurisdiction. See Vetrotex Certainteed Corp. v.

Consolidated Fiber Glass Products Co., 75 F.3d 147, 152 (3d Cir. 1996) (communications by telephone and letters between resident and nonresident in developing a contract are insufficient). There is no evidence that the one-time provision of waterproofing for a construction project in Virginia entailed an ongoing relationship or required future contacts by Chamberlin with Pennsylvania. Performance was to be in Virginia. The alleged breach occurred in Virginia. Chamberlin's representatives never traveled to Pennsylvania for any purpose related to the contract. Any payments were presumably sent to Chamberlin in North Carolina. There is certainly no evidence that Chamberlin was obligated to direct any payments to or render any performance in the forum.[2]

While it may appear to plaintiff to be more convenient to litigate its claim here, it is not prudent to proceed in a forum where there is even significant doubt about personal jurisdiction. Regardless of the effort or resources expended, any judgment rendered in the absence of personal jurisdiction would be void. See Rogers v. Hartford Life & Accident Ins. Col., 167 F.3d 933, 940 (5th Cir. 1999); Dennis Garberg & Assoc. v. Pack-Tech International Corp., 155 F.3d 767, 771 (10th Cir.

[2] Because personal jurisdiction has not been established, there is no venue under 28 U.S.C. § 1391(c) and it otherwise clearly appears that a substantial part of the events or omissions giving rise to plaintiff's claim did not occur here.

1997); Blake v. Bentsen, 1995 WL 428706, *1 (E.D.N.Y. July 12, 1995); Tandy, 564 A.2d at 1307-08.[3]

A district court that lacks personal jurisdiction over a defendant has discretion to dismiss or to transfer the case to a district in which personal jurisdiction could be established. See Porter v. Groat, 840 F.2d 255, 257 (4th Cir. 1988); Corke v. Sameiet M.S. Song of Norway, 572 F.2d 77, 80 (2d Cir. 1978); Taylor v. Love, 415 F.2d 1118, 1120 (6th Cir. 1969), cert. denied, 397 U.S. 1023, 90 S. Ct. 1257, 25 L.Ed.2d 533 (1970); Mayo Clinic v. Kaiser, 383 f.2d 653, 656 (8th Cir. 1967); Dubin v. U.S., 380 F.2d 813, 815 (5th Cir. 1967); Shaw v. Boyd, 658 F. Supp. 89, 92 (E.D. Pa. 1987). Also, 28 U.S.C. § 1631 has been construed to encompass transfers for lack of personal, as well as subject matter, jurisdiction. See Ross v. Colorado Outward Bound School, Inc., 822 F.2d 1524, 1527 (10th Cir. 1987); Carty v. Beech Aircraft Corp., 679 F.2d 1051, 1065-66 & n.17 (3d Cir. 1982); Juffe v. Julien, 754 F. Supp. 49, 53 (E.D. Pa. 1991); Nolte & Nolte, 738 F. Supp. at 166. See also Hill v. U.S. Air Force, 795 F.2d 1067, 1070-71 (D.C. Cir. 1986).

In the instant case it appears that personal jurisdiction and venue would be proper in either the Western

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[3] If plaintiff intends to pursue its claim against Southern over which the court clearly lacks personal jurisdiction and venue, it may actually be more convenient and efficient ultimately to proceed in a forum in which personal jurisdiction and venue is clear as to both defendants.

District of North Carolina or the Western District of Virginia. The contract in question was executed on July 25, 1996. Thus, the statute of limitations for any subsequent breach has not run.[4] Under the circumstances, the most appropriate course would appear to be a dismissal and to allow plaintiff to decide where it wishes to proceed.

Accordingly, defendant Chamberlin's Motion to Dismiss will be granted. An appropriate order will be entered.

[4] See 42 Pa. C.S.A. § 5525(8) (four year statute of limitations for contract claim founded upon a writing); N.C. Gen. Stat. § 1052 (three years); Va. Code Ann. § 8.01-246 (five years).

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O R D E R

AND NOW, this day of June, 1999, upon consideration of defendant Chamberlin Company's Motion to Dismiss (Doc. #3) and plaintiff's response thereto, consistent with the accompanying memorandum, **IT IS HEREBY ORDERED** that said Motion is **GRANTED** and, defendant Southern Commercial's motion to dismiss also having been granted, the above action is **DISMISSED**.

BY THE COURT:

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JAY C. WALDMAN, J.